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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 414

BENJAMIN HALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 197–199, 204) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 11, 1945 (R. 200), and a petition for rehearing (R. 201–202) was denied on August 14, 1945 (R. 204). The petition for a writ of certiorari was filed on September 10, 1945. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient independent evidence of the petitioner's connection with the conspiracy to justify admission against him of statements made by co-conspirators in furtherance of the conspiracy and whether the evidence is sufficient to support the verdict.

2. Whether it was proper to allow the prosecutor to impeach a government witness whose testimony differed materially from a signed statement given by him to investigators.

STATEMENT

Petitioner was convicted on the first, third, and fourth counts of a four-count indictment returned against him and others in the United States District Court for the Southern District of Georgia (R. 1–7, 8). The first count charged a conspiracy to violate the internal revenue laws relating to liquor (R. 1–5), and the third and fourth counts each charged the possession of a different unregistered still (R. 6–7). Petitioner was sentenced to imprisonment for two years on count one and six months on each of counts three and four, the sentences to run consecutively, and to pay a fine of $5,000 on count one, and $500 on each of

counts three and four (R. 9–10).[1] On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 200). The evidence as to petitioner may be summarized as follows:

In January 1942, the defendants Davis, Parks, and Gaddis met in the home of Mr. and Mrs. Pirkle, who were named as co-conspirators but not indicted, near Augusta, Georgia, and discussed the setting up and operation of a still (R. 16–17, 31–32). Mr. Pirkle testified that Davis was to buy the whisky produced at the still at $1.25 per gallon, that Gaddis was to receive one-half of the profits and Pirkle and Parks a fourth each, and that petitioner was not mentioned in the discussion (R. 17, 24). Mrs. Pirkle, who was present and heard the conversation (R. 17, 32), testified that the arrangements were that Davis was to buy the liquor, and that petitioner, Pirkle, Parks, and Gaddis, were each to receive one-fourth of the profits (R. 32); that it was stated that petitioner could get sugar in Atlanta, and Parks could obtain it in Dahlonega (R. 32, 45).

A still was set up on a rented site in Burke County, Georgia (R. 17–18, 32, 33), and the Pirkles moved to a larger house in order that Gaddis and his wife might live with them (R. 18, 32). Sugar was delivered to the Pirkles' house

[1] Petitioner's sentence in case No. 301, this Term, is to run consecutively to the sentence imposed in the instant case.

and to the still by Gaddis and Parks and the defendants Perry and Roberts (R. 18, 19–20, 33, 34). Petitioner once called at the house with Parks looking for Gaddis (R. 40–41, 47).

On several occasions during the early part of 1942, petitioner, in the company of Perry and Roberts, purchased one to two thousand pounds of cane sugar at a time from a wholesale grocer in Atlanta. On some occasions petitioner paid for the sugar and the men with him loaded it on trucks. (R. 69, 74.) On February 19, 1942, petitioner purchased approximately ten thousand pounds of burnt sugar through another wholesale dealer in Atlanta (R. 71–72, 73–74).

On March 9, 1942, Roberts was arrested while driving a truckload of sugar (R. 20). Davis learned of the arrest and called "Ben" in Atlanta (R. 21; see also R. 37). When Roberts delivered the sugar at the Pirkles' house later that same day, he stated that petitioner had sent someone to get him out of jail (R. 21, 37). Petitioner, Perry, Gaddis, Davis, and Parks were frequently observed at a filling station in Atlanta, and Davis telephoned that station when Roberts was arrested (R. 115–116, 133). Late that night petitioner was observed at a filling station near Thomson, Georgia, and was later seen driving toward Augusta (R. 111, 126). The next day Roberts was arrested at the Thomson filling station driving a truck carrying non-tax-paid liquor

(R. 110, 126). On March 26, 1942, federal and state officers seized and destroyed the still (R. 19, 22, 34, 62, 112–113).

Thereafter, another still was set up in Jefferson County, Georgia (R. 22–23). On May 8, 1942, Perry, under the assumed name of Smith, bought a Chevrolet truck from a Mr. Carr (R. 48–49, 51). Petitioner accompanied Perry at the time of the purchase and drove the truck away (R. 49, 50). The first load of liquor taken from the still, driven by Roberts, was "hijacked" (R. 23, 34–35). The truck purchased by Perry was later found by state officers abandoned on the highway (R. 54). Subsequently Perry, still using the name of Smith, accompanied by petitioner, asked Carr for a duplicate bill of sale in order to enable him to repossess the truck (R. 50–51), and petitioner and Perry called for the truck from the person who had purchased it from the officers (R. 57, 58, 60). On May 21, Roberts was seen driving the truck to Pirkle's house (R. 63). On May 24, Roberts was arrested while driving another truck containing illicit whisky (R. 64, 129–130). The Jefferson County still was discovered the same day (R. 64, 65, 130; see R. 23, 34).

ARGUMENT

Petitioner attacks (Pet. 4, 5, 6, 7, 8) the sufficiency of the evidence to support his conviction, and the admissibility of Mrs. Pirkle's testimony that at the meeting in her home in January 1942

it was stated that petitioner was to have a one-fourth share in the profits; that Roberts had reported that petitioner had obtained his release from jail following his arrest on March 9, 1942; and that Parks had told her petitioner was suspicious of Roberts (R. 32, 35–38). Mrs. Pirkle's testimony in respect of the January meeting clearly related to declarations made by conspirators in furtherance of the conspiracy, and was, therefore, properly admitted against petitioner if there was independent proof connecting him with the conspiracy. *Glasser* v. *United States,* 315 U. S. 60, 73–74; *United States* v. *Compagna,* 146 F. 2d 524, 530 (C. C. A. 2), certiorari denied April 2, 1945, Nos. 935, 942, 946, October Term, 1944.[2] The other two declarations, although closely related to matters in execution of the conspiracy, were not so clearly in furtherance thereof. However, neither of such statements had the same probative force as the testimony concerning the initial arrangements for petitioner's share in the venture and, in view of the strength of the other evidence (see *infra*), we do not think the admission of Mrs. Pirkle's testimony can be

[2] See also *United States* v. *Manton,* 107 F. 2d 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States,* 91 F. 2d 691, 696 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States,* 302 U. S. 764; *McDonald* v. *United States,* 89 F. 2d 128, 133 (C. C. A. 8); *Laska* v. *United States,* 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker* v. *United States,* 21 F. 2d 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621.

deemed reversible error. Cf. *Delaney* v. *United States*, 263 U. S. 586, 590.

The evidence that petitioner had purchased large quantities of sugar, that at least some of that sugar was carried by Roberts and Perry, who were particularly closely associated with petitioner and who were regular haulers to and from the Pirkle house and the stills; that petitioner was in frequent association with others of the conspirators as well; that he accompanied Perry at the time of the purchase and repossession of the truck which was later observed at the Pirkles' house (see Statement, *supra* pp. 3–5), were independent circumstances sufficient to warrant the jury in concluding that petitioner was a member of the conspiracy. This evidence, together with the testimony concerning petitioner's share in the venture, was clearly sufficient to support the verdict.

2. Petitioner's objection to the prosecutor's impeachment of government witness Moore (Pet. 5, 7) is without substance. Moore was questioned as to sales of sugar in Dahlonega, Georgia, to petitioner's co-defendant Parks. Moore's testimony differed materially from a signed statement he had given to investigators, and the prosecutor was thereupon allowed to question him as to his prior statement (R. 75–96). The propriety of allowing the Government to impeach its own witness under such circumstances is well estab-

lished. *Hickory* v. *United States,* 151 U. S. 303, 309; *Walker* v. *United States,* 104 F. 2d 465, 470 (C. C. A. 4); *United States* v. *Graham,* 102 F. 2d 436, 441–442 (C. C. A. 2), certiorari denied, 307 U. S. 643. *Young* v. *United States,* 97 F. 2d 200 (C. C. A. 5), does not contradict this rule (cf. Pet. 7–8). Furthermore, as the court below pointed out (R. 198), petitioner is in no position to complain of the impeachment of Moore, for Moore's testimony in no way implicated him.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 414

BENJAMIN HALL,
Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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STATUTE:

Sec. 88 of Title 18, U.S.C.	3, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. .....

BENJAMIN HALL,
Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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Benjamin Hall prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause July 11, 1945, (order denying motion for rehearing entered August 14, 1945), affirming the orders and judgments of the District Court of the United States for the Southern District of Georgia which overruled petitioner's motion for a directed verdict.

ORDERS AND JUDGMENTS BELOW

The order and judgment of the court overruling petitioner's motion for a directed verdict appears in the

record at pp. 139, 155. The opinion of the Circuit Court of Appeals appears in the record at p. 197.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 11, 1945 (R. 200), and the order denying a rehearing was entered August 14, 1945 (R. 204). The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Was the evidence sufficient to authorize the conviction of petitioner.

(2) Did the court err in affirming the judgment of the District Court which permitted the Assistant United States District Attorney to seek to impeach a Government witness in such a way as to disclose to the jury ex parte statements in the nature of hearsay evidence which were favorable to the Government and hurtful to petitioner.

(3) Did the court err in affirming the District Court in subjecting a Government witness to a long and gruelling cross-examination in such a manner as to disclose to the jury ex parte statements in the nature of hearsay which were favorable to the Government's case and which were hurtful to petitioner.

(4) Did the court err in affirming the judgment of the District Court in refusing to rule out hearsay testimony.

STATUTE INVOLVED

The statute involved is Sec. 88 of Title 18 U. S. C.; Criminal Code, Sec. 37; Revised Statute, Sec. 5440, and will be found in the Appendix, infra, p. 8.

STATEMENT

Petitioner was indicted at the May Term 1943 by a United States Grand Jury in and for the Augusta Division of the Southern District of Georgia (R. 1). The indictment contained four counts and charged petitioner with a conspiracy to violate various provisions of the Internal Revenue Laws. Petitioner went to trial on the 22nd day of November 1944 and the jury returned a verdict of guilty on counts 1, 3 and 4 on the 27th day of November 1944 (R. 8). On January 6, 1945, the court sentenced petitioner to serve a sentence of two years on count 1; six months on count 3 and six months on count 4 and to pay a fine of $5000.00 on count 1, and $500.00 on each of counts 3 and 4 (R. 9-10).

The pertinent facts, as disclosed by the evidence, are substantially as follows:

Petitioner resides in the City of Atlanta approximately 175 miles from Augusta. He was jointly indicted with Raymond J. Davis, Grady Parks, Olin Luther Gaddis, Luther Tate Connor, Ernest Cecil Tanner, Wesley Howard Roberts, James Wesley Perry, Musgrove Young and George Washington Wright. Petitioner was never apprehended at any distillery nor was he ever apprehended with any non-tax paid whiskey or with any contraband which would definitely connect him with the crimes charged.

The chief co-conspirator, Roy Pirkle testified:

> "I never did see Ben Hall in Richmond County. As to did I ever see him anywhere, not that I know of. I never did have any contact with him. As to would I know whether he ever came to Richmond County or Burke County, no, sir, I wouldn't know" (R. 18).

He further testified:

> "Grady Parks, Gaddis and Davis made the arrangements, the others did not have anything to do with it. Ben Hall did not have anything to do with it" (R. 24).

The trial court permitted Ruth Pirkle, wife of Roy Pirkle, to testify over objection that she heard a conversation between Parks, Gaddis and her husband that Ben Hall was to get one-fourth of the profits (R. 32). She testified that Hall was not present and according to her testimony she only saw Hall in Richmond County on one occasion (R. 40). She did not testify that Hall was ever seen in connection with any liquor transaction. She testified as to certain conversations she had with Grady Parks and Raymond Davis about Ben Hall (R. 35-36) and she testified that defendant Roberts came to Augusta and stated that he had just gotten out of jail with the assistance of Ben Hall (R. 37).

All the evidence against petitioner was purely circumstantial except the hearsay testimony of the witness, Ruth Pirkle. The circumstantial evidence was too remote to definitely connect petitioner with the crimes charged. He was convicted of a conspiracy to violate the Internal Revenue Laws and was also convicted of possessing two

illicit distilleries, although there is no evidence in the record to connect him with these offenses.

At the conclusion of all of the evidence petitioner moved for a directed verdict upon the grounds that the evidence was insufficient to warrant his conviction. This motion was overruled (R. 155). A motion was also made to rule out the hearsay testimony delivered by witness, Mrs. Ruth Pirkle (R. 48).

Petitioner was sentenced to serve two years on count 1 of the indictment and to pay a fine of $5000.00; he was sentenced to serve six months on each of counts 3 and 4 and to pay a fine of $500.00 upon each of said counts.

Upon appeal by petitioner to the Circuit Court of Appeals for the Fifth Circuit the judgment of the court below was affirmed (R. 200).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the District Court of the United States did not err in refusing to direct a verdict for petitioner on the ground that the evidence was insufficient to warrant his conviction.

2. In holding that the District Court did not err in permitting the Assistant United States Attorney to seek to impeach a Government witness in such a way as to disclose to the jury ex parte statements in the way of hearsay evidence which were favorable to the Government and hurtful to petitioner.

3. In holding that the District Court did not err in

subjecting a Government witness to a long and gruelling cross-examination in such a way as to disclose to the jury ex parte statements in the nature of hearsay which were favorable to the Government and hurtful to petitioner.

4. In holding that the District Court did not err in refusing to rule out the hearsay testimony of the witness, Ruth Pirkle.

5. In not reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The first question involved is whether the evidence was sufficient to warrant the conviction of petitioner.

One cannot be held as a member of a conspiracy upon mere proof that he had knowledge of it or negatively acquiesced in the offense. There must be active participation in the crime.

United States v. Falcone,
311 U. S. 205

The evidence against petitioner was of such character that it was necessary to rely on remote circumstances in order to hold that he was guilty. Petitioner was not connected with any transaction that was *per se* illegal. There is no direct evidence that he entered into a conspiracy with any person and there are no circumstances disclosed by the evidence which are sufficient to warrant the holding that there was a conspiracy existing between petitioner and other parties. There was no evidence that petitioner was ever present at either one of the illegal distilleries or that he owned or possessed them. The evi-

dence relating to Hall was entirely circumstantial except the testimony of Mrs. Pirkle which we contend was illegally admitted as being hearsay.

The offense of conspiracy is separate from various crimes which may be objects of conspiracy.

O'Brien v. United States,
51 F. (2d) 674 (13) (7 C.C.A.)
Graham v. United States,
15 F. (2d) 740 (3) (8 C.C.A.)
Hall v. United States,
78 F. (2d) 168 (1) (10 C.C.A.)

Though a defendant be guilty of a conspiracy to commit a substantive offense, he is not necessarily guilty of the substantive offense.

United States v. Cusimano,
123 F. (2d) 611 (2) (7 C.C.A.)

Beland v. United States,
117 F. (2d) 958 (3) (5 C.C.A.)

The second and third questions relate to the manner and method of the cross-examination of Government witness, Robert M. Moore, by the trial judge and in his ruling permitting the prosecuting attorney to seek to impeach the witness. The examination by the court and by the prosecuting attorney disclosed to the jury ex parte statements in the nature of hearsay which were favorable to the Government and hurtful to petitioner.

The Fifth Circuit Court of Appeals has held that it is not permissible for one to impeach his own witness unless he has been surprised and his case prejudiced by the testimony.

Young v. United States,
97 F. (2d) 200-205

The fourth question involved pertains to the court's ruling with reference to the hearsay testimony delivered by the witness, Ruth Pirkle. Her testimony was clearly not declarations of a co-conspirator in furtherance of the alleged conspiracy. They were mere narrations of past events.

Clark v. United States,
61 F. (2d) 409 (3) (5 C.C.A.)
United States v. Goodman,
129 F. (2d) 1009 (4) and citations

For all of the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

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APPENDIX

Section 88 of Title 18 U. S. C.; Criminal Code Sec. 37 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Sec. 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Sec. 37, 35 Stat. 1096.)"